

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAVID HOWARD)	
Claimant)	
V.)	
)	Docket No. 1,060,317
INNOVIA FILMS, INC.)	
Respondent)	
AND)	
)	
NEW HAMPSHIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant and Respondent requested review of the October 27, 2014, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on March 10, 2015.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for the claimant. Karl L. Wenger, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found March 16, 2012, to be the date of accident and concluded claimant provided timely notice, but denied benefits after finding the accidental injury did not arise out of and in the course of claimant's employment and claimant's moving furniture for his daughter and not his work duties was the prevailing factor causing claimant's back condition and need for medical treatment. Since the claim was found non-compensable, the request to have outstanding medical bills paid in the amount of \$3,502.18 was also denied.

Claimant appeals arguing the Board should reverse the ALJ because the activity of moving his daughter for 30 minutes is very minor compared to his work activities and therefore his work activities are the prevailing factor in his back injury. Based on the credible evidence, claimant contends he has a 63 percent work disability.

Respondent contends the ALJ should be affirmed with respect to prevailing factor and reversed on the issue of notice. Respondent does not believe claimant's work activities are the prevailing factor for the injury and believes claimant failed to provide timely notice of a work-related injury. Respondent argues if repetitive trauma is determined, the date of accident would be claimant's last day worked, March 8, 2014, and if there is no injury by repetitive trauma, the date of accident would be March 4, 2012. In either scenario, respondent contends claimant failed to give timely notice as respondent alleges notice was provided on April 5, 2012. Should the Board find this claim compensable respondent contends the opinions of Dr. Fevurly and Mr. Benjamin should be adopted.

Issues on Appeal:

1. Did the ALJ err in determining the date of injury by repetitive trauma?
2. Did claimant give timely notice?
3. Were the repetitive activities performed at work the prevailing factor in causing claimant's injury, need for medical treatment and disability?
4. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant began working for respondent in June 2006 as a slitter. Respondent makes cellophane into rolls weighing about 1,100 pounds. These rolls are put on the back of a machine with a hoist and then run through another machine to be cut into smaller rolls. There are 10 rollers and 10 motors on the machine used to cut the cellophane.

Claimant testified that on March 2, 2012, it was taking longer to make the rolls because the film was bad and every five minutes the roll would build up and had to be taken off the machine, the cellophane untwisted and a new core put on to start a new roll. Claimant was running machine number five at the start of his shift. In the late afternoon, he was switched to machine number six and continued working on that machine for the next two days. Claimant testified machine six did not have a hoist.

Claimant alleges injury to his low back through a series from March 2, 2012, through March 8, 2012. He believes the constant bending, twisting and lifting from his work duties caused the injuries to his back. Claimant testified that during this particular time he was

working with a bad batch of cellophane that made his job more difficult. Claimant testified that bad film means instead of coming out flat, it was wrinkling and was not coming out in one piece. Claimant speculated there was not enough moisture in the film. Claimant testified the roll was breaking all weekend and causing a lot more work for him.

Claimant testified that to fix a roll the following has to be done:

A. . . . when it breaks like that, you've got to -- okay. You got to put the machine on the slow speed to pull -- pull the film through so the cutted parts, the parts that are already cut come through, and then you got to go to each roll and you got to -- you got to flip the film back, cut a straight line across it, and then you got to attach this piece that's already been through up to this piece that's kind of like -- . . .

. . .

A. The piece come over like this, and then this piece here, you got to lay a piece of -- of tape underneath it with the sticky side sticking up, then you got to put one piece on this side, on half the side of the tape, and then the other piece on this side of the tape, and then you take another piece of tape with the sticky side down and put it on there and that's a splice¹

Claimant indicated he would have to stand at an awkward angle to splice, and he was doing a lot of splicing in March 2012. He also indicated it was unusual to do a lot of bending forward to splice, but during this time in March there was a bad batch of film and it kept breaking. Claimant testified that between March 2 and March 4 he made 10 to 20 splices at about 10 minutes per splice. Claimant testified respondent, more specifically Mike Basehor, the plant manager, knew the film was a bad batch and came in on his day off to get casting straightened out in order for it to pull out better.

While claimant was working, his back was aching and it was worse on March 4, 2012. He testified the entire weekend was rough, but on March 4 his back was really aching. At the end of his shift, he immediately went to his parents house to get into their Jacuzzi. He ended up falling asleep on the floor with a pillow under his back to help with his pain. He slept for an hour and a half and then got into the Jacuzzi. Claimant testified that on March 4, he was bending 60 to 70 percent more than usual.

Claimant reported his symptoms to Keith Howard on March 4 right before the end of his shift. After the shift there was a safety meeting with Jeff Little, which claimant was asked to attend. Claimant said okay, but he could not wait to leave because his back was killing him. Claimant indicated Mr. Howard knew he was having difficulty with the machine. However, he didn't specifically state his work was causing him to have low back pain. Claimant continued to work through March 8, with the same aching.

¹ P.H. Trans. (June 5, 2012) at 14-15.

Claimant believed he mentioned his back pain to Dave Hackett, a coworker, around March 4, but he could not say if Mr. Hackett remembers this. Apparently Mr. Hackett was working on a machine next to claimant and Mr. Howard and claimant assumed Mr. Hackett heard him tell Mr. Howard his back was killing him.

Claimant worked March 2-4, was off March 5-6, worked March 7-8 and was off March 9-11. The days he had off were his regularly scheduled days off. Claimant's back continued to ache even on his off days.

Claimant indicated he used his parents Jacuzzi on March 7 and 8 for his low back. He testified his pain level at the end of his shift on the 4th was a four or five on a 0-10 scale. At the end of his shift on the 7th and 8th, his pain level was a three. Claimant did not seek any treatment with a doctor.

Claimant was scheduled to work March 12 starting at 6:00 p.m., but he called in around 5:30 or 5:45 p.m. and spoke with George Anderson, a shift manager, to report he would not be in that night for his shift. Claimant reported his back was sore and that he just got back from helping his daughter move. Claimant denies he reported his back was sore from moving. He also never reported that his back was hurting from his work. Claimant testified his truck was loaded with a 7 foot couch, two chairs, a TV stand and two televisions, the old tube kind. The entire move took 35 minutes. Claimant testified he helped his daughter carry these items and didn't attempt to move anything heavy. The heaviest thing was the couch. Claimant denies any new injury from moving the furniture.

Claimant called respondent on March 13 indicating his back was still sore and he would not be in. He testified his pain level was a three. He was scheduled to be off on March 14 and 15. Claimant felt this time off would help him and he would be able to return to work on March 16. Claimant planned to return to work on the 16th, but he received a call from Cheryl Elder, in HR, informing him an appointment had been made for him with the company doctor for 9:30 that morning. The appointment was to make sure his back was okay for him to return to work.

Claimant met with Dale Garrett, M.D., the company physician, on March 16, 2012, and told the doctor his back had been hurting since March 2. He reported trying to use a pillow and hot tub to relieve his pain. He also mentioned helping his daughter move. He did not report that he thought helping his daughter caused his back pain because he felt it was his work. Dr. Garrett gave claimant a 20 pound lifting restriction, which claimant took to Ms. Elder. Dr. Garrett also advised claimant to see his family physician. Claimant was not allowed to return to work because Ms. Elder told him he had to be 100 percent. Claimant was willing to work light duty if it were available. When claimant presented his restrictions to Ms. Elder he was given short-term disability paperwork to fill out. On this form, claimant put he was injured at work. Claimant's request for short-term disability was denied.

Claimant met with Dan Severa, M.D., a physician in the office of his family physician, Loree Cordova, M.D., on March 20, 2012. Claimant was given pain medication and a muscle relaxer for his back. Claimant indicated he felt the medications helped.

Claimant has not worked since March 8, 2012. He testified his back is somewhat better, but he still has problems. Before this, claimant did not have any problems similar to the current problems with his back.

Claimant testified there were other times where there was bad film for several days, but he didn't have back complaints then. He explained he could have been running machine number five, which has a hoist that mechanically takes the roll off and you only have to run up the roll and drop it down to be hoisted and lifted. Claimant testified each roll weighs 30 to 40 pounds, and he takes a roll off every five minutes. During a 10 or 12 hour shift, lifting and turning is required to handle the rolls. During a shift, there are usually two to four breaks and also down time between loading the machine and when the first roll is put in. It takes five minutes to load a roll and splice it in. Claimant testified it could take three hours to make a large roll into eight or nine smaller rolls.

Richard Seelbach, finishing day supervisor for respondent, is in charge of the finishing department. Mr. Seelbach is in charge of claimant, despite working days and claimant working the later shift. Mr. Seelbach testified he was working on March 13, 2012.

Mr. Seelbach indicated claimant had not worked since he called in on the 13th. He did not know why claimant called in on March 12, but he talked with claimant on the 13th and the reason claimant gave for not coming in was due to back pain from helping his daughter move. He testified claimant specifically said, "I hurt my back moving my daughter".² Mr. Seelbach testified that had claimant reported he injured his back on-the-job when he talked with claimant on March 13, he would have called Cheryl in HR to see what needed to be done.

Cheryl Elder has been benefits administrator for respondent for six years. Her job involves taking care of all the different employee benefits, including medical, workers compensation and short-term disability.

On March 16, 2012, Ms. Elder sent claimant to see a doctor after Jeff Little informed her claimant had taken some days off because he hurt his back moving his daughter. Ms. Elder testified Mr. Little was informing her to find out if claimant needed to see a doctor before he returned to work. Claimant did, and an appointment was made with Dr. Garrett. Ms. Elder testified she did not send claimant to a doctor because she thought he had a work injury. She sent claimant to Dr. Garrett for a fit-for-duty physical. She testified Dr. Garrett is familiar with the physical requirements of the job and anyone who is coming back

² P.H. Trans. (Aug. 29, 2012) at 7-8.

to work from injury must be cleared so they do not further injure themselves. After the appointment, claimant came to the plant and presented restrictions.

Ms. Elder informed claimant that respondent does not accommodate restrictions unless it is a workers compensation situation. Ms. Elder then offered to get claimant short-term disability and FMLA paperwork. She indicated this was to make sure claimant was physically okay before he returned to work. At no time during this exchange, did claimant report his injury as work-related to Ms. Elder. Had claimant reported a work injury, Ms. Elder would have turned it in to the workers compensation carrier. She would not have provided claimant with short-term disability paperwork. She testified she didn't check with the slitting department to see if claimant had complained of back pain from his work.

Ms. Elder testified claimant turned in his short-term disability paperwork directly to Mutual of Omaha, so she was not aware claimant was claiming a work injury until she received a call asking why the claim was not turned into workers compensation. She had no idea claimant put on his disability paperwork that his injury was work-related.

Mr. Hackett has known claimant for three or four years. Mr. Hackett heard through the plant that claimant called in on March 12 and 13 due to a back injury. This was the same time claimant was moving his daughter. Mr. Hackett testified claimant told him he wasn't sure if he injured his back at work or while helping his daughter move. Mr. Hackett was not aware of any physical activities claimant performed since his last day of work for respondent. Mr. Hackett testified that after claimant's alleged injury at work, claimant mowed Mr. Hackett's front yard for him. Mr. Hackett denies claimant ever told him he was filing a workers compensation claim due to financial difficulties. Mr. Hackett testified there is a policy that if someone gets hurts they are to report the injury and if they don't, anyone who witnessed the accident should report the injury.

Mr. Hackett testified that 90 percent of the time there was bad film on the slitter. He indicated the job was pretty physical, requiring a lot of bending, twisting, stooping, etc. He indicated the rolls of film he handled weighed 30 or 40 pounds. There are specifications in the rule book on how much can be lifted safely and how much to not exceed. Mr. Hackett testified he and claimant worked back and forth on machines five and six all the time. He went on to testify he and claimant were the only ones to run five and six. He testified that machine six sits lower than the rest so there is definitely a lot more leaning over when operating it. He testified that sometimes your back can hurt while working on machine six from leaning over for several hours in the shift, but he could deal with it.

Claimant did not return to work for respondent because they would not accept him unless he was 100 percent. Claimant wakes up sore and stiff and, on occasion, has tingling down his leg and up his back. While sitting, he constantly changes position. He tries to do light activities, like weed eating for 10 minutes and raking for 20 minutes. Extensive walking causes him pain. He attempted to paint his mother's porch, but his pain had increased to a ten after two hours.

Nancy Howard, claimant's mother, testified that in early March 2012, she was very much aware claimant was having problems with his back. She indicated claimant came over every night to use her vibrating back pillow and her hot tub for about two hours. Claimant would come over when his back pain was really bad. She was aware claimant called in to work on March 12 and 13 because he called from her house. She testified she encouraged him to call in because she thought he just needed a couple of days and he would get better. She was present when claimant made the call to respondent and does not recall claimant reporting he hurt his back helping his daughter move. She had no idea claimant helped his daughter move. She heard claimant say, "I can't come in because my back's still hurting." She admits claimant was going through finance modification with his home at the time, but he was not having financial difficulty.

Katelyn Howard, claimant's daughter, testified she asked claimant to help her move some furniture from her mom's house. She called claimant because he had a truck and she wanted to borrow it. Ms. Howard testified claimant told her he had back pain and he asked how much they were moving. She told him there were five pieces she needed help with and one she could carry on her own. Ms. Howard testified claimant helped carry a couch, a television and a recliner. She testified that the heaviest thing carried was 30 pounds. She indicated she took the heaviest end of what they carried because of claimant's back and because she wanted to do as much as she could because they were moving her things. She indicated she didn't see anything that would lead to claimant hurting himself while moving any of the items. They did not have to take any rest breaks while they were moving the items. Ms. Howard testified claimant stayed around to visit for about an hour after they finished moving and during that time claimant mentioned his back was hurting, but related it to his work activity the week before. She testified claimant told her he hurt his back before the day they moved her furniture.

Dale Garrett, M.D., MPH, is an occupational environmental medicine physician. His practice consists of injury prevention for workers and to treat injured workers. He also does occupational environmental screening, OSHA regulated, non work-related treatment and monitoring and environmental monitoring. Basically, he helps injured individuals who are trying to return to work after both work-related and non work-related injuries. He sees mostly those who have been injured at work and are looking for a determination if they are ready to return to work. He also does preemployment physicals.

On March 16, 2012, Dr. Garrett was working at Stormont-Vail Workcare, and had the opportunity to evaluate claimant to determine if claimant was fit to return to work. He indicated the referral to him was not related to a workers compensation injury. Dr. Garrett testified claimant's initial complaints were low back pain that claimant reported developed after lifting some furniture for his daughter. Dr. Garrett acknowledged a medical assistant took claimant's history, but then he went over the history with claimant. Claimant reported the initial onset of his back ache was on March 12 at about 2:45 p.m. while carrying furniture, couches and a television stand. Claimant did not mention his lower back hurting prior to March 12, nor did claimant mention any pain two weeks prior to this March 16 visit.

Dr. Garrett testified claimant was concerned about going back to work because he might hurt his back.

Dr. Garrett explained to claimant that the details of the examination are confidential and the only thing the employer gets is one sheet indicating if the employee is fit to return to work or not. He testified he hasn't had anyone tell him they were actually injured at work and their situation should be workers compensation. If that were to happen, he indicated he would still take the history and talk about the mechanism of the injury. Had claimant reported his injury occurred at work, Dr. Garrett would have noted that in the report.

Dr. Garrett diagnosed claimant with low back pain and recommended follow-up with his private medical provider. He opined the pain was a personal condition and, based on the history provided, felt claimant's work was not the prevailing factor for claimant's need for treatment and his impairment. He determined claimant's activity outside of work would be the prevailing factor. He determined the onset of claimant's symptoms began March 12, 2012, following helping his daughter move.

Dr. Garrett thought claimant was sincere and in genuine pain. He gave claimant a 20 pound weight limit for lifting, pushing or pulling, and prohibited prolonged or repetitive bending or twisting at the waist. He also advised claimant to seek medical attention with his primary physician. He was not aware that claimant's employment was terminated based on his fit for duty evaluation.

At the request of his attorney, claimant met with Pedro Murati, M.D., on May 22, 2012, for an examination. Claimant complained of low back pain when bending forward. He denied any significant injuries to his low back prior to his work-related injury that was sustained in a series from March 2, 2012, through March 8, 2012. Claimant reported his back pain began while he was working with a bad batch of cellophane. He tried soaking his back for a few days, but it didn't help.

Dr. Murati examined claimant and diagnosed low back pain with signs and symptoms of radiculopathy. He opined his diagnosis was within all reasonable medical probability a direct result of the March 2, 2012, to March 8, 2012, work-related injury. He recommended an MRI of the lumbar spine to rule out any disc pathology and a bilateral lower extremity NCS/EMG to include the lumbar paraspinals to evaluate/document any radiculopathy. Based on the results of these tests, Dr. Murati recommended the appropriate physical therapy, anti-inflammatory and pain medication as needed and a series of lumbar epidural steroid injections. Should conservative treatment fail, he recommended a surgical evaluation.

Dr. Murati assigned claimant temporary restrictions within an 8 hour workday, of no bending, crouching or stooping; no crawling; no lifting, carrying, pushing or pulling over 10 pounds occasionally and 5 pounds frequently; rarely squat; occasionally sit, stand, walk, climb stairs or ladders and drive.

Claimant met with Dr. Murati for another examination, on January 22, 2013. Claimant had complaints of frequent low back pain that occasionally goes up the back, numbness in the left leg and low back pain that gets worse with general activities. Dr. Murati again diagnosed the same low back pain with signs of radiculopathy and a new diagnosis of non work-related bilateral peripheral neuropathy. Dr. Murati opined his diagnosis of low back pain with signs of radiculopathy was within all reasonable medical probability a direct result from the work-related injuries sustained in a series from March 2, 2012 to March 8, 2012. He recommended yearly follow-ups for the low back in case any complications ensue. He found claimant to be a poor surgical candidate due to his uncontrolled diabetes and smoking habit. He testified claimant should consider epidural injections, but with close monitoring of his blood sugar levels.

Dr. Murati assigned permanent restrictions within an 8 hour workday of no bending, crouching or stooping; no crawling; no lifting, carrying, pushing or pulling over 20 pounds, occasionally 20 pounds and 10 pounds frequently; rarely squat, climb stairs or ladders; occasionally sit or drive; frequently stand or walk and alternate sitting, standing and walking.

Dr. Murati applied his permanent restrictions to the task list of Dr. Barnett and opined claimant could no longer perform 13 out of 14 tasks for a 93 percent task loss.

Dr. Murati assigned a 10 percent whole person impairment, based on the 4th Edition of the *AMA Guides*, DRE category III. With regard to prevailing factor Dr. Murati opined:

The claimant sustained multiple repetitive traumas at work which resulted in low back pain. The claimant is a young person. His smoking habit although deleterious is not known as a direct cause of any of his diagnoses. His hobbies are not known as a direct cause of any of his diagnoses. He has no significant pre-existing injuries that would be related to his medical conditions. He has significant clinical findings that have given him diagnoses consistent with multiple repetitive traumas. Therefore it is under all reasonable medical certainty, the prevailing factor in the development of his conditions, is the multiple repetitive traumas at work.³

Dr. Murati indicated he didn't think he was aware claimant helped his daughter move and then did not return to work. Claimant told him his back symptoms started in March 2012 while repetitively bending over to fix film. Dr. Murati also testified that people claimant's age are going to have degenerative changes and just because you have a degenerative disc does not mean it is a prevailing factor for pain.

Claimant met with Chris Fevurly, M.D., on April 2, 2013, at respondent's request, for an examination. His complaints were low back pain aggravated by bending, stooping and prolonged nonstop static position. Claimant reported his pain level was a three. At its

³ Murati Depo., Ex. 3 at 4 (Dr. Murati's Jan. 22, 2013, IME report).

best, it was a two and at its worst, a four to five. Dr. Fevurly wrote that claimant reported helping paint the interior of his daughter's house and while on a ladder, he aggravated his back pain. Claimant reported his back pain radiated into the flank once per month. He noticed both legs in the anterior thighs would go numb for 15 minutes after walking on the treadmill, or while sitting in the recliner. He denied pain in his legs. Claimant had no prior history of low back injury.

Dr. Fevurly indicated that although claimant denies the March 12 activities of moving his daughter contributed to his back injuries, the objective medical records reflect moving furniture contributed to the injury. Dr. Fevurly pointed out that Dr. Garrett's records reflect claimant's low back pain resulted after moving his daughter's belongings.

Dr. Fevurly examined claimant and found chronic regional low back pain without radiculopathy; probable mild lower extremity peripheral neuropathy secondary to diabetes⁴; degenerative disc disease with disc bulges at L3-4 and L4-5 without significant central canal or neural foraminal stenosis⁵; and Diabetes type II for over 6 years. Dr. Fevurly found claimant to be at maximum medical improvement and opined:

The objective evidence for right S1 radiculopathy is equivocal at best. There are changes on EMG of the right leg consistent with right S1 radiculopathy but there are no significant symptoms in this nerve root distribution; in addition there is no sensory dermatomal deficit, no myotomal weakness, no loss of the right ankle jerk and no current abnormality on sitting or supine straight leg raising.⁶

Dr. Fevurly assigned claimant a 7 percent whole person impairment, based on the 4th Edition of the *AMA Guides*.

Considering claimant's difficulty with some activities, Dr. Fevurly found it reasonable to limit claimant's bending and stooping to an occasional basis. He found claimant qualified to lift up to 50 pounds on an occasional basis and 35 pounds on a frequent basis.

Dr. Fevurly found there is no reasonable indication or expectation for further diagnostic testing, consultations, prescription medicines or other therapeutic intervention directed to the alleged injury to the lumbar spine from the work activities in early March 2012.

⁴ He opined the peripheral neuropathy was not a work-related condition and is likely contributing to the complaint of numbness in the lower extremities.

⁵ He opined it was not likely that this bulging was caused by the work events.

⁶ Fevurly Depo., Ex. 2 at 7 (Dr. Fevurly's Apr. 2, 2013, report).

Dr. Fevurly testified the prevailing factor for claimant's condition is his age. He testified this condition is very common in 50 year-olds and has nothing to do with the events in March 2012. He went on to state that these findings take years to develop and occur as a natural consequence of living.⁷

Dr. Fevurly had the opportunity to review the task list of Steve Benjamin and opined that out of 21 tasks, claimant could no longer perform 6 for a 28.6 percent task loss. For just the tasks for respondent, claimant could no longer perform 6 out of 11 tasks for a 54.5 percent task loss.

Claimant met with vocational expert Robert Barnett, Ph.D., via telephone, on January 2, 2014, for a task and wage loss opinion, at the request of his attorney. Dr. Barnett indicated claimant was making \$660 a week. Dr. Barnett determined claimant could earn a minimum of \$290 a week, which results in 56 percent wage loss. He opined claimant could work as a motel desk clerk, in a call center or in light assembly, to name a few things. He felt claimant could do something sedentary.

Claimant was interviewed by Steve Benjamin at respondent's request for a vocational opinion, on February 19, 2014. Claimant received unemployment benefits from December 2012 to September 2013, and he was trying to get Social Security disability benefits. Mr. Benjamin compiled a list of jobs claimant had over 15 years and used the 5 years prior to the date of the injury to compile a task list. Mr. Benjamin identified 21 tasks for claimant.

Mr. Benjamin indicated in his report that claimant's average weekly gross wage was \$703.31 (\$660 per week for 40 hours plus \$43.31 in overtime). Mr. Benjamin stated, in his professional opinion, claimant should be able to re-enter the open labor market within the posed permanent work restrictions of Dr. Garrett, Dr. Murati and Dr. Fevurly. He also felt claimant should be able to re-enter the open labor market earning approximately \$393 in a 40 hour work week. This would put claimant closer to an entry-level type wage with a 41 percent wage loss. Mr. Benjamin named a few jobs claimant could perform including bench assembler, manufacturing/production helper, and security guard. He had a larger list of other jobs he felt were reasonable for claimant to compete for in the open labor market. He also indicated which jobs claimant would be able to perform within each doctor's restrictions.

⁷ Fevurly Depo. at 15.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-520(a) states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

Claimant's last day worked with respondent was March 8, 2012. Respondent contends claimant failed to provide notice of his alleged injury by repetitive trauma until April 5, 2012. The ALJ found claimant gave notice on March 16, 2012, when the short-term disability forms were completed showing his problems were work-related. However, Ms. Elder testified the short-term disability forms were sent by claimant directly to the insurance company. Short-term disability forms sent to an insurance company would not constitute notice to the employer. Additionally, claimant's contention that he advised his supervisors of the work-related injuries was not supported by respondent's representatives. Claimant failed to advise Ms. Elder his injuries were work-related. Claimant told Mr. Seelbach he injured himself helping his daughter move furniture. The statute requires notice within 20 days of the last day worked. This record does not support a finding that claimant provided timely notice of the alleged series of injuries by March 28, 2012. The Board finds claimant failed to provide timely notice of his accident as required by the statute.

K.S.A. 2011 Supp. 44-508(e) states:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(A) states:

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

Claimant's contention that he suffered a work-related series of injuries from March 2 through March 8, 2012, is not supported by this record. None of respondent's employees support claimant's contention that he reported the alleged trauma. Dr. Garrett, who examined claimant shortly after the alleged series of trauma, recorded only that claimant injured himself while helping his daughter move furniture. The ALJ determined the prevailing factor for claimant's back pain was the moving of furniture for his daughter. The denial of benefits by the ALJ is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed with regard to the issue of timely notice, but affirmed regarding whether claimant suffered a work-related trauma which arose out of and in the course of his employment with respondent. The denial of benefits is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the denial of benefits in the Award of Administrative Law Judge Rebecca Sanders dated October 27, 2014, is affirmed in part and reversed in part and claimant is denied benefits from the alleged series of repetitive trauma during his employment with respondent.

IT IS SO ORDERED.

Dated this _____ day of April, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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